No. 76-1345

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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SOVEREIGN NEWS COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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DANIEL M. FRIEDMAN,
*Acting Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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Petitioner contends that the court of appeals erred in dismissing his appeal from district court orders denying its motions for return of seized property pursuant to Rule 41(e), Fed. R. Crim. P., on the ground that an indictment was returned against petitioner when the appeal was pending.

1. On July 17, 1975, petitioner filed two motions in the United States District Court for the Northern District of Ohio seeking return of property which had

been seized on March 19 and March 26, 1975, in execution of two search warrants issued by a magistrate. After an evidentiary hearing, the district court denied the motions on October 15, 1975 (Pet. App. 20-21).[1] Petitioner filed a notice of appeal the next day. On March 25, 1976, after briefs were filed but prior to oral argument, the grand jury—whose investigation was going on during the pendency of petitioner's motions (Tr. 304)—returned an indictment against petitioner (Pet. 5; Pet. App. 17).[2]

The government then moved to dismiss the appeal. The court of appeals initially denied the motion (Pet. App. 19) but subsequently concluded that its denial was improvident and dismissed the appeal as interlocutory (Pet. App. 16-18; 544 F. 2d 909).

2. The court of appeals correctly dismissed the appeal as interlocutory. In *DiBella* v. *United States*, 369 U.S. 121, 132, this Court held that the denial of a motion for the return of seized property constitutes an appealable "final decision" under 28 U.S.C. 1291 only if the motion is "in no way tied to a criminal prosecution *in esse* against the movant." In that case the Court held that a denial of a motion for return of property, issued several days after an indictment was returned, was not appealable.

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[1] The court did order the return of certain of the seized items (*ibid.*).

[2] The indictment charges petitioner with importation, interstate transportation, and mail delivery of obscene materials, in violation of 18 U.S.C. 1461, 1462 and 1465.



Although *DiBella* itself involved an order issued after an indictment was returned, the principles of that decision apply equally to foreclose appeal when, as here, an indictment is returned after issuance of the order denying the motion but before the appeal is decided. First, the Court in *DiBella* indicated a number of circumstances, in addition to an indictment, which establish the existence of a criminal prosecution for purposes of determining whether a denial of a motion for the return of property is appealable. As the Court stated (369 U.S. at 131; citations omitted):

> Presentations before a United States Commissioner * * * as well as before a grand jury * * * are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train.

Here the district court denied petitioner's motions when a grand jury investigation was pending and thus, when the criminal prosecution was "fairly in train." See also *United States* v. *Glassman*, 533 F. 2d 262 (C.A. 5); *United States* v. *Peachtree, National Distributors*, 456 F. 2d 442 (C.A. 5); *Smith* v. *United States*, 377 F. 2d 739 (C.A. 3).[3]

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[3] As the court below noted (Pet. App. 18, n. 3), some courts have indicated that for purposes of appealing denials of Rule 41(e) motions, a criminal prosecution does not commence until the indictment is returned. See, *e.g.*, *United States* v. *Alexander*, 428 F. 2d 1169 (C.A. 8) and *Gottone* v. *United States*, 345 F. 2d 165 (C.A. 10), certiorari denied,

Second, the principles underlying the decision in *DiBella* apply fully when an indictment is returned when the appeal is pending but before the appellate decision has been rendered. In *DiBella* the Court emphasized (369 U.S. at 126) that

> the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law.

The mere fact that a notice of appeal from a Rule 41(e) ruling has been filed before an indictment is returned does not lessen the delay and disruption in the criminal proceeding that would result from permitting the appeal to go forward. In some cases it may be many months after the return of the indictment before an appellate decision is rendered—all to the sacrifice of the defendant's and the public's interest in speedy criminal trials. Furthermore, once an indictment is returned, the defendant's right to appellate review of the Rule 41(e) ruling is ensured and there is no need for an interlocutory appeal.[4]

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382 U.S. 901, on which petitioner relies (Pet. 9). In those cases, however, no indictment was returned before the decision on appeal and there was no indication that grand jury proceedings were pending when the district court ruled on the motions.

[4] Petitioner's argument (Pet. 11) that an interlocutory appellate decision on important evidentiary questions will promote judicial efficiency would apply to both pre- and post-indictment suppression motions, and that argument has been consistently rejected by the courts on the basis of the greater interest in securing speedy trials and avoiding the disruptions resulting from piecemeal review.

Petitioner's further contention (Pet. 11) that dismissal of appeals in these circumstances will prompt prosecutors to seek indictments in order to foreclose appeals from Rule 41(e) rulings is groundless. Prosecutors and grand juries are not likely to bring indictments merely for the purpose of retaining seized evidence, and in any event defendants cannot ultimately be deprived of their appellate remedy.



For the foregoing reasons, the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

JULY 1977.

* The Solicitor General is disqualified in this case.

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